Nos. 87-981, 87-1028, 87-1146
Consolidated

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In The

Supreme Court of the United States

October Term, 1987

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES, INC.,
and PRATT & WHITNEY CANADA, LTD.,

vs. *Petitioners,*

JOHN C. RAINEY,

Respondent,

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES, INC.
and PRATT & WHITNEY CANADA, LTD.,

vs. *Petitioners,*

RONDI M. KNOWLTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER, BEECH AEROSPACE SERVICES, INC.

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QUESTIONS PRESENTED

I. Whether opinions or evaluative conclusions contained in a trustworthy investigative report prepared pursuant to law are admissible pursuant to Federal Rule of Evidence 803(8)(C)?

II. Whether the Eleventh Circuit Court of Appeals misconstrued Federal Rules of Evidence 106 and 801(d)(1)(A) in holding the trial court abused its discretion by refusing to admit an unqualified lay opinion?

PARTIES TO PROCEEDING

All parties having an interest in these proceedings are accurately set forth in BASI's Petition for Writ of Certiorari, p.(i).

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OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit below is reported at 827 F.2d 1498 (11th Cir. 1987). (J.A. 136-178)

The order granting the rehearing *en banc* is reported at 791 F.2d 833 (11th Cir. 1986). (J.A. 134-135)

The original opinion of the Court of Appeals for the Eleventh Circuit is reported at 784 F.2d 1523 (11th Cir. 1986). (J.A. 119-133)

The final judgments for defendants on jury verdicts in the United States District Court for the Northern District of Florida (Pensacola Div.) were not reported. (J.A. 101-103)

JURISDICTION

The *en banc* opinion of the Eleventh Circuit Court of Appeals was entered on September 22, 1987, and reinstated the panel opinion entered on March 25, 1986. Jurisdiction of this Court was invoked under 28 U.S.C. 1254(1) by the filing of a Petition for Writ of Certiorari on December 18, 1987. Review was granted on February 29, 1988.

FEDERAL RULES OF EVIDENCE INVOLVED

1. Federal Evidence Rule 803(8)(C) *Hearsay Exceptions; Availability of Declarant Immaterial* provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(8) *Public records and reports.* Records, reports, statements of data compilations, in any form, of public offices or agencies, setting forth . . .

(C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

2. Federal Evidence Rule 106 *Remainder of or Related Writings or Recorded Statements* provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him, at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

3. Federal Evidence Rule 801(d) *Statements Which Are Not Hearsay* provides:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, ...

* * *

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own

statement, in either his individual or a representative capacity. . . .

STATEMENT OF THE CASE

This case involves two disputed evidentiary rulings in two wrongful death claims being tried before a jury. The issues before this Court are whether Rule 803(8)(C) authorizes admission of opinions or evaluative conclusions contained in 'rustworthy public reports prepared pursuant to law, and whether Rule 106 may be employed to admit otherwise inadmissible lay opinion testimony.

The Aircraft Accident

Lieutenant Commander (LCDR) Barbara Ann Rainey, a Navy primary flight instructor and her student Ensign (ENS) Donald Bruce Knowlton on July 13, 1982, signed out a T-34C Turbo-Mentor at NAS Whiting Field, Florida. This was Knowlton's fourth familiarization flight, and they were scheduled to practice "touch and go" landings and takeoffs at Middleton Field, Alabama. A "touch and go" is an exercise where the pilot lands, does not stop, takes off and then makes a climbing left turn to join the other aircraft circling the airfield (in a racetrack pattern) for another touch and go landing. There were five other planes in the pattern.

After the fourth landing, the Rainey-Knowlton airplane began its climbing left turn at an altitude lower and speed slower than recommended. The aircraft also made an early turn, and on its existing flight path the

Rainey airplane threatened a mid-air collision and cut out other aircraft already established in the pattern. This prompted radio transmissions from two other aircraft warning Rainey and Knowlton that they were cutting other aircraft out of the pattern. The Rainey aircraft did not transmit a response, but immediately switched to a hard right nose high turn from its left climbing turn. The aircraft lost flying speed and control, rapidly lost altitude, crashed and burned. Both pilots were killed.

Judge Advocate General Investigation Report (JAG Report)

The next day, the Commanding Officer of LCDR Rainey's squadron, pursuant to the requirements of the Judge Advocate General (JAG Manual Chapter VI and Section 0902 Chapter IX), appointed LCDR William C. Morgan, Jr. to investigate the accident and submit a report of the investigation. After a month and a half of investigation, the JAG Report was submitted on September 1, 1982. (J.A. 2) It contained four parts--a "Preliminary Statement," "Finding of Fact," "Opinions" and "Recommendations." The JAG Report was quite thorough and was accompanied by sixty supporting documents, termed "enclosures," consisting of 159 pages. The enclosures included summaries of both pilots' naval flight and medical records, the aircraft's history and inspection records, including an "outstanding maintenance form," air traffic control records, statements of other instructors and students in the "touch and go" pattern as well as other witnesses to the crash, crash crew rescue reports, photographs of the crash site

and wreckage, casualty reports, the engineering investigative report on the engine, statement of the pilots' spouses, diagram of the Middleton Field traffic pattern, and autopsy protocol and toxicology reports on LCDR Rainey and ENS Knowlton.

The report was received, reviewed and approved, without change, by the Commanding Officer of Training Squadron Three, Commanding Officer of Training Wing Five, the Chief of Naval Education and Training, the Chief of Naval Operations, and final approval was given by the Judge Advocate General of the United States Navy. The Report of the Judge Advocate General concluded that nothing was wrong mechanically with the airplane or physically with the pilots but that "[t]he most probable cause of the accident was the pilots [sic] failure to maintain proper inverval" with other aircraft in the traffic pattern. (J.A. 13-14)

Pretrial

LCDR John Charles Rainey and Rondi M. Knowlton, spouses of the crash victims, filed separate diversity actions on April 15, 1983, in the U.S. District Court in Pensacola, Florida. (J.A. 17) They sued the manufacturer of the aircraft, Beech Aircraft Corporation ("Beech"), its engine manufacturer, Pratt & Whitney Canada, Ltd. ("Pratt") and the aircraft maintenance contractor, Beech Aerospace Services, Inc. ("BASI"). The complaint alleged negligence and strict liability for defective design and manufacture, on the part of Beech and Pratt and negligent maintenance of the aircraft engine by BASI.

Specifically, plaintiffs alleged the proximate cause of the crash was a defect in the pneumatic fuel control unit which on occasion would cause an uncommanded loss of power during flight. Defendants denied liability and contended the fatal crash was the result of pilot error. Plaintiffs' cases were consolidated, the issues bifurcated and trial was held only on the issue of liability.

The admissibility of the JAG Report was first addressed at a pretrial conference on March 20, 1984. Plaintiffs admitted the report was a public record, prepared pursuant to a duty imposed by law, and was trustworthy. The trial judge so ruled and initially held that under Rule 803(8)(C), the public records exception to hearsay, only the "Finding of Fact" but not the "Opinions" contained in the JAG Report would be admitted at trial. (J.A. 35) At a hearing the day prior to trial the judge in part changed his ruling and held that certain relevant opinions would be admitted. (J.A. 40) This included LCDR Morgan's opinion that "[t]he most probable cause of the accident was the pilots [sic] failure to maintain proper interval." In light of his new ruling, the judge granted plaintiffs' request for leave to challenge the trustworthiness of the JAG Report, call witnesses in addition to those previously disclosed, offer any evidence that pilot error was not the cause of the accident, and offer additional jury instructions concerning the JAG Report. (J.A. 41-42) Opting to proceed with trial, plaintiffs did not move for a continuance nor did they at any time move for a mistrial, or seek any other protective or remedial relief.

Trial

The only disputed issue during the two-week trial was the cause of the fatal crash. During defendants' case in chief, pertinent findings of fact and opinions from the JAG Report were admitted into evidence. (J.A. 79-97) Plaintiffs never, by witness or otherwise, sought to challenge the trustworthiness of the JAG Report, or that it was a "public record made pursuant to authority granted by law," or that it fell within the public records exception to hearsay, Rule 803(8)(C). Their sole objection was that opinions in the report were inadmissible under the narrow interpretation of the Rule.

Both sides relied heavily on the opinion of expert witnesses, and defendants relied in part on the following evaluative conclusions or opinions from the JAG Report (J.A. 97):

1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

***

7. The most probable cause of the accident was the pilots' [sic] failure to maintain proper interval.

During trial LCDR John C. Rainey was called by Beech to testify as an adverse witness. On direct examination he was questioned concerning the letter he had written to the JAG investigator, LCDR Morgan. (J.A. 54-75) The questions to Rainey on direct were strictly limited to objective facts involving unnecessary pressure on the pilots prior to the flight and the final flight maneuver of the aircraft prior to the crash. During direct examination of Rainey by Beech, he was never asked if his letter contained an opinion as to the cause of the accident. On cross-examination, Rainey's own counsel asked: "In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably [sic] primary cause of this mishap was rollback?" (J.A. 77) The trial judge sustained the defendants' objection on the grounds that Rainey had not been qualified as an expert witness and therefore, could not express an opinion. (J.A. 77-78) No effort was made by Rainey's counsel, either at that time or during plaintiffs' case in rebuttal, to elicit Rainey's qualifications and experience as a pilot nor to tender him as an expert on any subject. Nor was there any attempt by any party at any time to offer the letter or any part of it into evidence. The letter appears in the record for the first time only as an exhibit to Rainey's Memorandum in Support of his Motion for New Trial. (J.A. 104) There was no proffer of any of this evidence, no motion for mistrial or continuance, or other curative effort on the part of Rainey's counsel.

The trial on liability consumed two full weeks. Witnesses testified in person, by video tape, and by deposition concerning the accident, design and development

of the T-34C aircraft and the Pratt engine, maintenance procedures, and other incidents in which "rollback" was alleged to have occurred. On July 20, 1984, the jury returned a verdict for defendants. (J.A. 98-100)

Appeal

After a timely Motion for New Trial was denied by the trial judge, Rainey and Knowlton sought a review by the Eleventh Circuit Court of Appeal. On March 25, 1986, a panel of that court held that the district court had committed reversible error in the two evidentiary rulings discussed above. (J.A. 119) The court agreed with the trial judge that the JAG Report was trustworthy and acknowledged that the prevailing view in sister courts favored admissibility under Rule 803(8)(C) of evaluative conclusions contained in public records. The Eleventh Circuit panel concluded, however, that it was bound to apply the narrow interpretation of "factual findings" set forth in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980) to hold the opinion portion of the JAG Report was improperly admitted.

Despite the fact that Rule 106 was raised for the first time by the Eleventh Circuit in its opinion, it also held the cross-examination of Rainey was improperly restricted and remanded the case for a new trial. In a specially concurring opinion, Circuit Judge Johnson noted that *Smith* "is an anomaly among the circuits" and urged reconsideration by the full court of the admissibility of evaluative conclusions under Rule 803(8)(C).

On May 27, 1986, a rehearing *en banc* was granted. (J.A. 134) Following submission of additional briefs on the issues, by opinion dated September 22, 1987, the Eleventh Circuit split six-six on the issue of the admissibility of evaluative conclusions contained in a trustworthy public record. (J.A. 136) The court concurred with the ruling on Rainey's cross-examination and reinstated the original panel's decision remanding the case for a new trial. The Petition to this Court for a Writ of Certiorari to review these two evidentiary rulings was filed on December 18, 1987. Review was granted on February 29, 1988.

SUMMARY OF ARGUMENT

A. Opinions in trustworthy public reports are admissible under Federal Rule of Evidence 803(8)(C).

This case involves the admissibility of opinions contained in a Report of the Judge Advocate General (JAG Report) on the cause of an aircraft accident killing a Navy flight instructor and student. The JAG Report was admitted into evidence under the public records and reports exception to hearsay, Fed.R.Evid. 803(8)(C). The JAG Report was trustworthy and otherwise unchallenged by the survivors of the two pilots who sued Petitioners.

Historically, in conceiving the Rule the House Committee intended a narrow application of the term "factual findings" to exclude from evidence opinions contained in public records and reports. The Senate

and Advisory Committee strongly disagreed and urged a *broad* interpretation of the Rule to admit opinions and evaluative conclusions from public reports into evidence.

Legal scholars on evidence uniformly urge the use of the *broad* interpretation of the Rule to admit opinions of the public officer or agency making the investigation as required by law. Subsequent to its adoption in 1974, all circuits (including the Fifth Circuit) applied the broad interpretation of the Rule admitting opinions contained in a trustworthy public report. These include opinions or "evaluative conclusions" from reports of the CDC, EEOC, FAA, JAG, Coast Guard, and FCC to reports of highway patrolmen as to the cause of an accident.

In the case *sub judice*, the Eleventh Circuit, having been formed from the old Fifth Circuit, felt bound by the Fifth Circuit case of *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980). Only *Smith* adopted the narrow construction, excluding from evidence opinions contained in trustworthy public records and reports. This is despite at least three pre-*Smith* and at least four post-*Smith* opinions rendered by the Fifth Circuit to the contrary.

Legal scholars and Circuit Courts of Appeal recognize the policy considerations behind the broad application of the Rule. These include reliability, time, necessity, value, and harmony within the Federal Rules. The prevailing view favors admissibility in the first instance and places the burden on the party opposing the report to demonstrate it is untrustworthy.

Untold public financial and human resources are devoted to investigations which involve an unlimited spectrum of problems from discrimination complaints to accident investigations. Eliminating the use of these invaluable resources in relevant civil proceedings eradicates the advances which have enriched this country over the past decades of enlightened justice and social progress.

B. Federal Rule of Evidence 106 is not designed to make admissible that which is inadmissible.

Rule 106 requires, upon admission into evidence of a part of a document by a party, such additional *admissible* portions that in fairness reflect the complete context of the part admitted. The purpose of the Rule is destroyed if it is used to admit evidence that is otherwise inadmissible.

Plaintiff Rainey was called as an adverse witness by Beech. On direct examination he was asked about factual matters concerning the pilots' pre-flight activities and the final maneuver of the aircraft leading to the fatal crash. The Eleventh Circuit erroneously concluded that Beech's counsel questioned Rainey and elicited two damaging statements contained in a letter Rainey wrote to the JAG investigator. These statements acknowledged a violation of traffic pattern integrity and a premature turn without proper interval by his wife's aircraft. These statements, however, were *not* presented to the jury.

On cross-examination, Rainey's counsel announced to the jury, in the form of a leading question, Rainey's

opinion that the cause of the accident was engine failure. Beech's objection on the ground Rainey had not been qualified as an expert was sustained. The Eleventh Circuit, having misapprehended the jury's exposure to Rainey's two damaging statements, applied Rule 106 to avoid what is perceived to be an "unfairness inherent in 'the misleading impression created by taking matters out of context.' " (J.A. 130)

The inescapable effect of the court's use of Rule 106 creates a tactical vehicle to make admissible unqualified lay opinion testimony which is otherwise inadmissible. Rule 106 controls only the order in which proof is presented and must be positively invoked at the time the writing is first offered or it is waived. Rule 106 was not invoked during trial, or during the appellate process by Rainey and Knowlton. It appeared for the first time in the Eleventh Circuit's opinion. (J.A. 130) This was untimely and clearly error.

The jury was not exposed to Rainey's damaging admissions. The substance of the facts actually submitted to the jury did not constitute a prior inconsistent statement and Rule 801(d)(1)(A) and (B) simply do not apply.

ARGUMENT

A. Opinions or evaluative conclusions contained in a trustworthy investigative report prepared pursuant to law are admissible pursuant to Federal Rule of Evidence 803(8)(C).

The sole issue for the Court's determination, under this point, is whether opinions or evaluative conclusions contained in the JAG Report are admissible under the public records and reports exception to the hearsay rule. In material part, Fed.R.Evid. 803(8)(C) *Hearsay Exceptions; Availability of Declarant Immaterial* provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (8) *Public records and reports.* Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . . .
>
> (C) in civil actions and proceedings . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Rainey and Knowlton have not contested any qualifying element of the JAG Report other than the admissibility of opinions contained in the report. The only basis for their assault is that opinions or evaluative conclusions do not fall within the narrow definition or intended meaning of the term "factual findings." The court split six-six on the issue. Six judges felt bound by the Fifth Circuit's opinion in *Smith v. Ithaca Corp.*,

612 F.2d 215 (5th Cir. 1980)[1] which required reinstatement of the panel opinion. Nine other Circuit Courts of Appeal and decisions before and after *Smith* in the Fifth Circuit join all legal commentators and disagree with *Smith*. Opinions and evaluative conclusions contained in trustworthy public records and reports are admissible under the broad interpretation of the Rule adopted by an overwhelming majority of the courts and all legal scholars on evidence.

Legislative History

While BASI believes opinions and evaluative conclusions are clearly within the definition of a finding,[2]

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[1] The Eleventh Circuit was formed in 1981 by separating Florida, Georgia and Alabama from the Fifth Circuit Court of Appeals. The Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

[2] A "finding" is a "decision upon a question of fact reached as the result of a judicial examination or investigation by a court, jury, referee, coroner, etc." Black's Law Dictionary 569 (5th ed. 1979). It also "commonly applies to any statement of fact that represents a conclusion on the part of any investigator. * * * The language of 803(8)(C) literally provides for the admission of entire agency reports so long as those reports include, *inter alia*, factual findings. . . ." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1143-44 (E.D.Pa. 1980), *aff'd in relevant part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

resort to the legislative history of the Rule reveals the source of the dispute. It also illuminates the solid foundation, purpose and logic supporting a liberal interpretation of the Rule.

The House Judiciary Committee when approving Fed.R.Evid. 803(8)(C) stated its intention was to strictly construe the term "factual findings" to exclude evidence of evaluations or opinions. Report of the Committee on the Judiciary, H.R. Rep. No. 650, 93d Cong., 1st Sess. 14 (1973), *reprinted in* 1974 U. S. Code Cong. & Admin. News 7051, 7075, 7088. The Senate Committee on the Judiciary agreed with the Advisory Committee's interpretation. The Senate Committee strongly disagreed and rejected the narrow interpretation of the House, stating:

> The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. §78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C.§269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of

> Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

Report of the Committee on the Judiciary, S. Rep. No. 1277, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7064-65. Congress enacted the legislation without changing the language, however, the Conference Committee failed to address the scope of Rule 803(8)(C) as it relates to admissibility of opinions or evaluations.

Commentary By Legal Scholars

BASI's research for comments by legal scholars on evidence has revealed uniform support for the admission into evidence of opinion or evaluative conclusions contained in public records and reports that qualify under Rule 803(8)(C). The following brief summary of comments by authors of recognized treaties demonstrates the consistencies of their views:

4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶803(8)[03] at 803-251 (1985)	Rule 803(8) should be interpreted in accord with the treatment of "opinion" evidence. If the report states a conclusion that would be helpful – and is reliable – it should be admitted.

McCormick, *Evidence* §316, at 890-891 (3d ed. 1984)

> The trend . . . has been to recognize that much useful evidence is to be found in investigative reports, with impetus from the many statutory enactments providing for admissibility. * * * The case for liberal construction is strong.

4 D. Louisell & C. Muller, *Federal Evidence* §455 at 741 (1980)

> [T]he Report of the Senate Judiciary Committee . . . specifically endorsed the receipt of "evaluative reports," preferring to rely upon the "trustworthiness" provision to exclude public records of this sort if warranted under particular circumstances. And the Advisory Committee itself drafted the language ultimately enacted in Rule 803(8)(C), plainly intending to include "evaluative" materials. It is these latter interpretations which should control the construction of clause (C), ...

M. Graham, *Handbook of Federal Evidence* at 844 and 848 (2d ed. 1986)

> [D]isagreement existed at common law as to the admissiblity of such "evaluative" reports. The approach taken in Rule 803(8)(C) is to provide for admissibility unless the

> sources of information or other circumstances indicate lack of trustworthiness. * * * The Report of the Senate Committee advances the preferred position.

G. Lilly, *An Introduction to the Law of Evidence* §7.19 at 273 and 275-276 (2d ed. 1987)

> Admission here is justified, if at all, by the probability that the officials conducting the investigation (who themselves are under a public duty) will be careful and discriminating in selecting the factual data upon which to rely in reaching their findings and conclusions. * * * This receptive approach recognizes that the value of investigative reports often lies in their conclusions which are not, strictly speaking, purely factual.

R. Lempert & S. Saltzburg, *A Modern Approach to Evidence* §3 at 449-50 (2d ed. 1982)

> In our view the Senate has the better of this dispute. * * * Thus, if an official investigation into the cause of an airplane crash concludes that the crash resulted from pilot error, the report would probably be admissible under the public records exception.

Policy Considerations

It is the soundness of the policies which underlie the broad application of this Rule which speak most strongly in favor of admissibility. These principles center on reliability, time, necessity, value, and the harmonious spirit of the Federal Rules of Evidence.

Reliability is a most important basic policy consideration. The Advisory Committee observed that the Rule is premised on "the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." Fed.R.Evid. 803(8)(C) Advisory Committee's Note citing *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir. 1952). Most investigators under a public duty lack a motive to distort the facts or their conclusions. In *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir. 1984), the court held that:

> "Admissibility in the first instance" is assumed because of the reliability of the public agencies usually conducting the investigation, and "their lack of any motive for conducting the studies other than to inform the public fairly and adequately." Kehm v. Procter & Gamble, 724 F.2d 613, 618, 619 (8th Cir. 1983).

The *Ellis* court cited with approval the case of *United States v. American Tel. & Tel. Co.*, 498 F.Supp. 353 (D.D.C. 1980):

> The rationale for the admissibility of factual findings contained in public records, as explained in the cases cited above, lies in their *fundamental trustworthiness*. The guarantee of trustworthiness does not necessarily reside in the contents of the records, be they facts or conclusions, but rather in their source. "[P]ublic records or reports, by virtue of their being based on legal duty and authority, contain sufficient circumstantial guarantees of trustworthiness to justify their use at trial."
>
> Since the reliability of the factual findings results essentially from the fact that the public official concerned is pursuing an investigation authorized by law, *there is no reason not to admit the findings simply because they tend towards the conclusionary rather than the factual,* and, unless, as Rule 803(8)(C) further provides, the sources of information or other circumstances indicate lack of trustworthiness. (emphasis in original)

See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1144 (E.D.Pa. 1980), *aff'd in relevant part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Counsel for Rainey and Knowlton admitted prior to the pretrial conference of March 20, 1984, that the Report of the Judge Advocate General was prepared pursuant to law and there was absolutely no evidence to impugn its trustworthiness. LCDR Morgan's duty was to the United States Navy, and he had no motive to distort the facts or his conclusions. By virtue of no challenge by the plaintiffs, both the trial judge and the court below held the report was trustworthy.

Time was identified by Dean McCormick as an important factor in urging admission of the investigator's conclusions based on his prompt start and fresh exposure to witnesses and other evidence.

> The most important reason is *time*. The officer comes on the scene usually as early as it is feasible

> to get there. Usually the investigators of the parties come later and the statements are frequently partial and one-sided. The witnesses at the trial have often only a dim recollection of the event, and their testimony rests mostly on their pre-trial refreshment of memory by these statements. The officer is often able to interview witnesses before they have been pulled one way or the other by the parties. The officer, too, is frequently a specialist – a doctor reporting death, a fire marshall investigating a fire – or at least experienced in like investigations, such as a highway patrolman reporting on a collision. (emphasis added)

McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?* 42 Iowa L.Rev. 363 (1957).

In the instant case LCDR Morgan's appointment came the day after the accident. The sixty enclosures attached to his report demonstrate the thoroughness of his investigation. The report itself was completed September 1, 1982, 50 days after the accident and long before legal proceedings were initiated.

Necessity forms the foundation for another policy reason favoring the admission of evaluative conclusions in reports. Acceptance of investigative reports in lieu of the testimony of public officials not only simplifies legal proceedings but avoids disruption of the administration of public affairs at all levels of government. Requiring the public official to testify as a foundation to introduce the records and reports would be most cumbersome, expensive and time-consuming and almost certainly would create a class of official witnesses. The Rule provides that the appearance of the public official is necessary only when the party opposing admission of

the report challenges it as untrustworthy. The reasoning is explained in *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301-302 (4th Cir. 1984):

> Placing the burden on the opposing party makes considerable practical sense. Most government sponsored investigations employ well accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. Rather than requiring the moving party to spend considerable time and money to ensure that the experts who conducted the study are available at trial, it is far more equitable to place that burden on the party seeking to demonstrate why a time tested and carefully considered presumption is not appropriate.
>
> * * *
>
> The burden rested with Playtex, however, not Ellis, to demonstrate that the methodology was flawed. The hearsay exception assumes regularity of procedure absent a showing to the contrary. See generally Weinstein Evidence ¶¶803(8)[01] and [03]. Thus, whether the declarant or the investigator was available to testify about the methodology or whether the report stated its methodology, are not by themselves, reasons to exclude the studies.

Rainey and Knowlton, after agreeing the JAG Report was trustworthy, thereafter never attempted to challenge the report. They knew for months prior to trial defendants fully intended to offer the JAG Report into evidence. Yet they made no effort to depose or call LCDR Morgan.

Valuable human and financial resources devoted to public investigations required by law are also essential considerations. These include exhaustive

studies and reports performed by such public agencies and officers as the Center for Disease Control, Equal Employment Opportunity Commission, Federal Aviation Administration, Federal Bureau of Investigation, Coast Guard and Reports of the Judge Advocate General. They cover the spectrum from scientific studies to accident investigations to the merits of discrimination claims. Very substantial sums of money and untold human hours are devoted to them. The Rule recognizes that their reliability and the value of their admissibility would be inexcusably wasted if these evaluative reports could not be admitted into evidence. The Fifth Circuit in *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972), considered the admissibility of an EEOC report under the Federal Business Records Act, a predecessor of the current rule. The reasoning applied there remains sound:

> The Commission's decision contains findings of fact made from accounts by different witnesses, subjective comment on the credibility of these witnesses, and reaches the conclusion that there is reasonable cause to believe that a violation of the Civil Rights Act has occurred. Certainly these are determinations that are to be made by the district court in a de novo proceeding. We think, however, that to ignore the manpower and resources expended on the EEOC investigation and the expertise acquired by its field investigators in the area of discriminatory employment practices would be wasteful and unnecessary.

The record is devoid of evidence challenging the methodology LCDR Morgan employed in conducting his investigation in accordance with the JAG manual and arriving at his opinions. The trial court recognized the

value of the opinions contained in the Report of the Judge Advocate General and most properly admitted the report into evidence.

Harmony is the foundation upon which the Federal Rules of Evidence are based and interpreted. To do otherwise would completely frustrate the purpose of the rules. To attach a severely restricted significance to the term "factual findings," as required by the narrow interpretation of the Rule, is inconsistent with the other Federal Rules of Evidence. The broad application of Rule 803(8)(C) to permit the introduction of evaluative reports corresponds with Fed.R.Evid. 703 and 704. Rule 703 provides that the facts forming the basis of an expert's opinion need not themselves be admissible as long as they are "of a type reasonably relied upon by experts in the particular field." *See also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1148 (E.D.Pa. 1980), *aff'd in relevant part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Fed.R.Evid. 704 provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Public records are excepted from the hearsay evidence rule because they are presumed reliable. The reliability of a particular evaluative report can be tested either with the trustworthiness challenge embodied in Rule 803(8)(C), or with objections permitted by Fed.R.Evid. 702 and 705. Rule 702 permits objections to the qualifications of an expert, and Rule 705 authorizes disclosure on cross-examination of facts and data underlying an expert's testimony. The harmonious

interplay of Rules 702 and 705 with Rule 803(8)(C) was discussed in *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir. 1978), where the Third Circuit noted:

> The objections permitted by Rules 702 and 705 provide a means of testing their reliability. Before these objections may be recognized, however, the party challenging the validity of an official report admitted under 803(8)(C) must come forward with some evidence which would impugn its trustworthiness. [Citation omitted.] To allow objections to be sustained under Rules 702 and 705 without a showing of untrustworthiness would have the practical effect of nullifying the exception to the hearsay rule provided by Rule 803(8)(C).

In *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 304 (4th Cir. 1984), the court, without citation to Rule 705, discussed the underlying relationship between Rules 705 and 803(8)(C):

> In an era when scientific data is playing an increasingly important role at trial, they argue, there is no reason not to let the jury see and evaluate the same data that the experts – whether they be doctors or other specialists – are relying on to reach their conclusions.

The trial court, by admitting the findings and the relevant opinions in the JAG Report, permitted the jury to see what data Morgan had relied upon to reach his conclusions. Just as with the witnesses who testified at trial regarding the cause of the crash, the jury could give those opinions whatever weight it deemed they deserved.

Analysis of *Smith v. Ithaca*

Rainey and Knowlton based their objections to the opinion portion of the JAG Report entirely on the strength of *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980). The Eleventh Circuit felt bound by the precedent of its parent court set forth in *Smith* to hold the admission was error.

Smith, the sole authority relied upon by the Eleventh Circuit, is an isolated departure from the traditional approval by the Fifth Circuit in admitting evaluative conclusions under Rule 803(8)(C) and its predecessor. *Smith*, as observed by the Eleventh Circuit, is not only "an anomaly among the circuits," *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1530 (11th Cir. 1986), but it is an anomaly in the Fifth Circuit itself.

An early Fifth Circuit case on point is *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972), where the court approved admission of an EEOC report which contained the results of the investigation including factual findings and a conclusion of probable cause that violations existed. In *Smith v. Universal Services*, the Fifth Circuit specifically rejected the argument that the report was inadmissible because it contained evaluative or conclusionary findings as to probable cause. In *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975), the court held that FAA advisory materials which contained evaluative conclusions were relevant to the issue of negligence and admissible into evidence. *See also Hodge v. Seiter*, 558

F.2d 284 (5th Cir. 1977), (HUD investigative report properly admitted).

Smith v. Ithaca Corp., 612 F.2d 215 (5th Cir. 1980), is of no precedential value. A number of other Fifth Circuit cases were rendered subsequent to it in which public reports qualifying under Rule 803(8)(C) were admitted into evidence. In *Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543 (5th Cir. 1982), an entire Coast Guard accident report was admitted which attributed all of the blame for a collision to one vessel. Other Fifth Circuit cases of note include *McClure v. Mexia Independent School District*, 750 F.2d 396 (5th Cir. 1985) (EEOC probable cause determination properly admitted); *Local Union No. 59 v. Namco Electric, Inc.*, 653 F.2d 143 (5th Cir. 1981) (NLRB investigative report evaluating allegations admissible); and *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 499 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981) (error to exclude EEOC investigative determination).

There is absolutely no justification within the Fifth Circuit why *Smith v. Ithaca Corp*, 612 F.2d 215 (5th Cir. 1980), can serve as controlling authority in light of all other decisions to the contrary. *Smith* is not only a maverick within the Fifth Circuit, but stands alone as authority in the deadlock below for the narrow interpretation of the term "factual findings" in Rule 803(8)(C) to exclude opinions and evaluative conclusions from evidence.

Additional Considerations

The line of logic running from the Advisory Committee's Notes through the legislative history to

the commentators and cases interpreting the Rule supports the broad application of the Rule to permit admission of evaluative conclusions. The policy considerations underlying the *broad* construction are sound. To hold otherwise would require trial judges to make hairsplitting fact/opinion determinations which have been consistently rejected in other areas as unworkable. Clear-cut distinctions between fact and opinion are often impossible to draw, and the volume of cases requiring appellate review on this issue would drastically increase. As Dean McCormick observed, the fact/opinion differentiation has "proved to be the clumsiest of all tools furnished the judge. . . ." McCormick, *Evidence* §11 at 27 (3d ed. 1984).

To restrict the use of evaluative reports will render impotent the time-proven value of public agency investigative reports and result in a waste of the valuable human and financial resources behind them. The following table demonstrates the breadth of the acceptance of evaluative conclusions throughout the Circuits and the variety of public reports in which they may be found:

Circuit	Case	Ruling
First	*Robbins v. Whelan*, 653 F.2d 47 (1st Cir. 1981), *cert. denied*, 454 U.S. 1123, 102 S.Ct. 972, 71 L.Ed.2d 110 (1981)	Error to exclude **National Highway Safety Board** report which included evaluative conclusions.

Second	*Litton Systems, Inc. v. American Telephone & Telegraph*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984)	**FCC** reports containing evaluative conclusions were properly admitted.
Third	*Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978), *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978)	Report of **Coast Guard** including evaluative conclusions were admissible in Jones Act litigation.
	Melville v. American Home Assurance Co., 584 F.2d 1306 (3d Cir. 1978)	**FAA** materials containing evaluative conclusions were admissible.
	Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238 (3d Cir. 1983) rev'd on other grounds 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed 2d 538 (1986)	Error to exclude evaluative conclusions on trade practices in **Treasury Department report.**
Fourth	*Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984)	Error to exclude **CDC** and state health department reports containing evaluative conclusions and statistical findings.

Fifth	*Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975)	**FAA** advisory materials including evaluative conclusions were properly admitted.
	Mac Towing, Inc. v. American Commercial Lines, 670 F.2d 543 (5th Cir. 1982)	Contents of **Coast Guard** report establishing fault were admissible.
Sixth	*Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 993, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979)	Evaluative conclusion in **Highway Patrol** report was admissible.
	In Re: Paducah Towing Co., Inc., 692 F.2d 412 (6th Cir. 1982)	**Administrative Law Judge's** conclusions with respect to reasonableness of a tug boat captain's actions were properly admitted.
Seventh	*Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986)	**EEOC** report containing evaluative conclusions were properly admitted.
Eighth	*Kehm v. Proctor & Gamble*, 724 F.2d 613 (8th Cir. 1983)	**CDC** studies containing evaluative conclusions on causes of toxic shock syndrome properly were admitted.

Ninth	*Plummer v. International Hotels Co.*, 656 F.2d 502 (9th Cir. 1981)	Error to exclude **EEOC** report containing evaluative conclusion of probable cause of discrimination.
Tenth	*Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986)	**Shooting Review Board** report containing evaluative conclusions that police officer acted within department guidelines was properly admitted.

The rapidly increasing quantity and variety of public records containing evaluative conclusions will be a valuable resource to the courts of this nation. The broad application of Rule 803(8)(C), which contains safeguards to prevent admission of unreliable evidence, will assist all courts in a more efficient administration of justice. The instant case involves an accident investigation, but if the narrow interpretation of Rule 803(8)(C) is adopted, the far-reaching effect will be felt in many other types of litigation. This notably would include discrimination and civil rights actions which for years have depended upon reports containing evaluative conclusions as to probable cause. This will cripple the advancement of social reform and justice which our country has enjoyed in recent decades.

BASI respectfully urges the Court to approve the admission of the evaluative findings contained in the JAG Report and reverse the decision of the Eleventh Circuit Court of Appeals.

B. The Eleventh Circuit Court of Appeals misconstrued Federal Rules of Evidence 106 and 801(d)(1)(A) in holding the trial court abused its discretion by refusing to admit an unqualified lay opinion.

Rainey was called by Beech as an adverse witness and questioned about factual matters contained in a letter Rainey had written to JAG investigator LCDR Morgan. Rainey had not been and never was qualified as an expert. Rainey's counsel on cross-examination asked Rainey if he stated in the letter that the most probable cause of the accident was engine malfunction. Beech promptly objected on the ground Rainey had not been qualified as an expert. The trial judge sustained the objection, (J.A. 77) and the Eleventh Circuit reversed and awarded a new trial. The Eleventh Circuit was motivated by an *erroneous* assumption that two damaging statements by Rainey in paragraph four of his letter (that his wife had committed pilot error) had been presented to the jury by Beech on direct examination. However, this evidence was *not* presented to the jury. Erroneously concluding the damaging admissions of Rainey in the letter had been submitted to the jury, the Eleventh Circuit improperly applied Fed.R.Evid. 106 and 801(d) as grounds for a new trial.

LCDR John C. Rainey, after making his own inquiry, wrote an undated letter to JAG investigator LCDR Morgan. The subject of paragraph four of Rainey's letter was a conclusion that "the aircraft piloted by his wife violated pattern integrity . . . as it turned crosswind without proper interval." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1527 (11th Cir.

1986). This was obviously contrary to his theory that the cause of the accident was engine malfunction.

The basis for the Eleventh Circuit's ruling that it was reversible error to exclude Rainey's unqualified opinion on the cause of the accident is as follows:

> Another issue raised by this appeal is whether the district court improperly restricted Rainey's trial testimony. A. H. Toothman, counsel for Beech Aircraft Corporation, called Rainey as an adverse witness. Rainey was questioned about the letter he had written to Lieutenant Commander Morgan about the "aircraft mishap." The questions concerned paragraphs two and four of the letter. In paragraph two, Rainey had written that before the training exercise, his wife, Lieutenant Commander Rainey, was under "unnecessary" pressure. According to Rainey, his wife had attempted to cancel the exercise "[o]n three separate occasions," and "was observed to terminate [one] conversation in an uncharacteristically heated and disgusted manner." *In paragraph four, Rainey had written that the aircraft piloted by his wife violated pattern integrity . . . as it turned crosswind without proper interval."* Rainey had also admitted that either his wife or Ensign Knowlton "react[ed] instinctively and abruptly by initiating a hard right turn, away from [the aircraft piloted by Lieutenant Colonel Habermacher]." Because these statements tended to support the defendants' theory that pilot error led to the crash, the district court, over Rainey and Knowlton's objection, permitted Mr. Toothman's inquiry. (emphasis added)

Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1528 (11th Cir. 1986). It is essential to remember that the italicized portion of the court's opinion above constitutes a misunderstanding of what was published to the

jury from the letter. This evidence was not presented to the jury in any form.

Rainey was not questioned by Beech about paragraph five of the letter which set forth his conclusion that the probable cause of the accident was an engine malfunction. On cross-examination Rainey's counsel made a statement of Rainey's opinion as to the cause of the accident in the form of the following question: "In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably [sic] primary cause of this mishap was rollback?" (J.A. 77) Beech's counsel promptly objected on the ground probable cause constituted an opinion and Rainey had not been qualified as an expert. (J.A. 77) The objection was sustained, and Rainey's counsel went no further. Rainey and Knowlton must not have been too concerned about the probative value of Rainey's undated letter because it was not offered or proffered in evidence at trial. It first appears in the record as an exhibit to their Motion for New Trial. (J.A. 104)

The court, having incorrectly assumed the references to air traffic violations were heard by the jury, concluded that Rainey's lay opinion as to the cause of the accident "would have placed the prior statements in context and clearly rebutted the misleading impression created by the prior statements alone." (J.A. 131) The court went on to state:

> The [trial] court, therefore, erred in permitting the defendants to examine Rainey about portions of his letter while prohibiting cross-examination about other relevant portions. Because paragraph five of the letter would have harmonized the prior

> statements with Rainey's stance at trial, the jury was given an incomplete and misleading impression of Rainey's position. Under the "rule of completeness" embodied in Rule 106, the limitation of Rainey's testimony was thus inherently unfair and an abuse of discretion. Rainey and Knowlton are entitled to a new trial. (J.A. 131-132)

Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1529-30.

Rule 106

With this as a foundation and despite the fact that the letter was never introduced or proffered and Rainey was never qualified as an expert, the Eleventh Circuit applied what it termed "the *concerns* of the Rule – fairness and completeness – to this case." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1529. (J.A. 130) The court explained its reasoning for relying on Fed.R.Evid. 106 as:

> Federal Rule of Evidence 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 is based on the "rule of completeness," and seeks to avoid the unfairness inherent in "the misleading impression created by taking matters out of context." (J.A. 130)

Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1529. In footnote 11, the court said:

> Technically, Rule 106 is limited in its application to instances when a party introduces a writing or recorded statement into evidence. Here, we find

> the defendants' questions concerning Rainey's letter tantamount to the introduction of the letter into evidence. We therefore apply the *concerns* of the Rule – fairness and completeness – to this case. (emphasis added) (J.A. 130)

Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1529 (11th Cir. 1986).

This application of Rule 106 in the manner used by the court below fractures the very purpose and intent of the rule. Rule 106 controls only the order of *admissible* proof. It clearly is not intended to transform inadmissible evidence into that which is admissible. This interpretation of Rule 106 was aptly expressed by the Sixth Circuit in *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1980):

> The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded. [Citing cases.]

A party may not use Rule 106 as a vehicle for admitting otherwise inadmissible testimony. *See also United States v. Burreson*, 643 F.2d 1344 (9th Cir. 1981); *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983), ("[I]n any event, Rule 106 does not render admissible evidence that is otherwise inadmissible.") This, however, is the unintended but inescapable result of the Eleventh Circuit's misuse of Rule 106. Permitting a party to offer an opinion when he has demonstrated no expertise on the subject matter, and where there is no evidence before the jury to invoke the doctrine of completeness, absolutely destroys the spirit of fairness Rule 106 espouses. To the contrary, it creates a tactical device for admitting a lay opinion in the case *sub*

judice. It also provides a manner in other cases for the admission of otherwise inadmissible evidence.

Rule 106 is also not applicable in the case at hand because Rainey's opinion was not offered to explain or qualify those portions of the letter about which Rainey was questioned on direct examination. Fed.R.Evid. 106 is only applicable where the portions of a document sought to be admitted are relevant to the issues, and are necessary to explain or qualify those portions of a document already admitted. *United States v. Walker*, 652 F.2d 708 (7th Cir. 1981). The direct examination of Rainey focused on factual matters relating only to the pilots' pre-flight activities and the final flight maneuver of the aircraft. In Beech's examination, there was no inquiry concerning the cause of the crash. When his own counsel sought to elicit such an unqualified opinion from Rainey, no part of the letter had been admitted. This testimony did not tend to explain or qualify any part of the letter or Rainey's previous testimony. It also was clearly beyond the scope of direct examination. The admissibility of this testimony cannot be justified by Rule 106 or any other theory.

In a similar situation, the court in *United States v. Greene*, 497 F.2d 1068, 1082 (7th Cir. 1974), refused to admit statements in a letter which were not offered to explain portions already in evidence. In so doing, the court stated:

> On cross-examination, Mrs. Estopinal admitted making the statement in a letter (written after Greene's arrest) that her son was a "happy-go-lucky" type. On re-direct, defense counsel did not ask Mrs. Estopinal to explain what she meant by this statement. Rather, defense counsel asked the witness what else she wrote in that letter without offering the letter into evidence. Defendant contends that the trial court's refusal to permit these questions on redirect violated the doctrine of completeness. Defendant's reliance on the evidentiary rule of completeness is misplaced since the doctrine applies to documents partially admitted into evidence. Here the letter itself was not evidence. In seeking to elicit statements previously made in a document, without introduction of the document itself, the defense was actually attempting to introduce a prior consistent statement. . . . Here, any prior consistent statements in Mrs. Estopinal's letter were made *after* a motive to falsify arose. . . . (emphasis in original) [Citations omitted.]

Rainey's self-serving but unqualified opinion was not offered to explain the mental state of the pilots or the final flight maneuver of the aircraft. It was clearly his unqualified opinion as to the ultimate cause of the accident. The Eleventh Circuit, in an effort to correct what it misconceived to be "inherently unfair" evidence, circumvented the requirements of Rule 106 by using what it termed the "*concerns*" of the rule. The court not only overlooked the fact that no part of the letter was ever offered or admitted into evidence, but also disregarded the fact that the opinion evidence was improper, irrelevant and not explanatory of the questions asked on direct. The completeness doctrine is not only inapplicable but certainly cannot be utilized for the purpose of requiring introduction of an inadmissible statement that is neither explanatory of non relevant to the admitted portions. *United States v. Marin*, 669 F.2d 73, 84 (2d Cir. 1986).

It is also fundamental that a party must positively invoke Rule 106 in a timely fashion or it is waived. *Hill v. Nelson*, 676 F.2d 1371 (11th Cir. 1982); *United States v. Winkle*, 587 F.2d 705 (5th Cir. 1979), *cert. denied*, 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979). The first time reference to Rule 106 appears in this case is in the original panel opinion. *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1529 (11th Cir. 1986). It was never raised by Rainey at trial, never argued to the trial judge on the Motion for New Trial, and never included in briefs submitted to the Eleventh Circuit on appeal.

In *United States v. Larranga*, 787 F.2d 489, 500 (10th Cir. 1986), the court refused a party's request to introduce an entire document on redirect. The opponent had used a portion of a document during cross-examination, and the party had failed to invoke Rule 106 at that time. In concluding Rule 106 had been waived, the court said:

> On appeal, the defendant argues that the transcript was admissible under Federal Rule of Evidence 106. This rule provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Fed.R.Evid. 106. Defendant did not follow the procedure outlined in Rule 106 "*at that time*" when the question and answers were introduced. Thus defendant's reliance on Rule 106 is misplaced. (emphasis added)

The time to invoke Rule 106 is when any portion of a document is first introduced. Rainey and Knowlton not only waived the application of the Rule at trial, but

never even raised it on appeal. The *sua sponte* application of the Rule by the Eleventh Circuit as set forth in footnote 11 (J.A. 130) is simply too late and cannot be used to justify the admission of otherwise inadmissible opinion testimony.

If Rule 106 is not invoked in a timely fashion, the evidence sought to be admitted may be admitted at a later time if the evidence is otherwise admissible on its own merits. Wright & Graham explain the reasoning behind this aspect of Rule 106:

> The failure to make a timely request for completeness may prevent the party from predicating error or the failure to enforce Rule 106; it does not, however, bar the party from introducing the explanatory material himself, *assuming that the material is admissible at his behest*. (emphasis added)

C. Wright & K. Graham, *Federal Practice and Procedure* §5076 (1978). Rainey's counsel did not attempt to invoke Fed.R.Evid. 106 during the direct examination. Rainey had the burden to demonstrate that the evidence was admissible on its own, independent of Rule 106. The trial judge correctly concluded that the disputed question sought an expert opinion from an unqualified lay witness and sustained the objection. There was no attempt whatever by Rainey's counsel to follow through at any time during the remainder of the trial to qualify LCDR Rainey as an expert and then offer or admit this evidence or to otherwise protect the record. Trial counsel has the affirmative burden of objecting in a timely fashion and to make every reasonable effort in conducting his case to fairly and completely present evidence and objections so that the trial

judge may make a fully informed ruling. He cannot now, for the first time on appeal, benefit from his total failure to act.

Rule 801

Denuded of the misconception that the two instances of pilot error referred to in Rainey's letter were published to the jury, there is no basis for finding Rainey's unqualified opinion was relevant or admissible and that its exclusion was reversible error. The Eleventh Circuit panel incorrectly concluded that the district judge had permitted Beech's inquiry into the damaging statements in Rainey's letter to JAG investigator Morgan that his wife's aircraft "violated pattern integrity . . . as it turned crosswind without proper interval." Concluding that these damaging statements of pilot error were submitted to the jury, the Eleventh Circuit interpreted these as prior inconsistent statements made by Rainey. *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1529-30, footnote 12 (11th Cir. 1986). Fed.R.Evid. 801(d)(1)(A) relates to prior inconsistent statements and provides:

> (d) Statements which are not hearsay. A statement is not hearsay if–
>
> > (1) Prior statements by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition,. . . .

Rainey and Knowlton successfully contended that Rainey's unqualified opinion as to the cause of the crash was admissible as a prior *consistent* statement to offset the damaging effect of Rainey's statements in paragraph four of the letter. Unknown to the Eleventh Circuit this evidence was *not* submitted to the jury. Fed.R.Evid. 801(d)(1)(B), admissibility of prior consistent statements, in material part, states that:

> (d) Statements which are not hearsay. A statement is not hearsay if–
>
> > (1) Prior statements by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony, and is offered to rebut an express or implied charge against the declarant of recent fabrication of improper influence or motive. . . .

Nothing in the testimony presented to the jury justified a "charge against the declarant of a recent fabrication or improper influence or motive." In fact, Rainey's testimony on direct was entirely consistent with his previous statements made before the jury from the letter. Rule 801(d)(1)(B) only permits the use of prior consistent statements to rehabilitate a witness who has been impeached. *United States v. Weil*, 561 F.2d 1109 (4th Cir. 1977). As Weinstein cautions:

> Rule 801(d)(1)(B) should apply only when there is some suggestion . . . that the witness consciously altered his testimony after making the inconsistent statement by which he has been impeached.

Since Rainey had not been charged with a recent fabrication or change from the facts set forth in the portion of letter disclosed to the jury, there was no basis or predicate for the admission of his opinion as to probable cause of the accident as a prior inconsistent statement. To hold otherwise would approve the unrestricted use of a prior self-serving consistent statement to bolster a party's general theory of the case. The Eleventh Circuit misapplied Rule 801(d)(1)(B), and its conclusion is in error.

If Rainey's counsel felt materially aggrieved by the district court's rejection of his unqualified opinion testimony that engine rollback was the probable cause of the accident, the rules provide ample remedies for any perceived error:

1. He should have attempted, after the trial judge sustained the objection or on rebuttal, to qualify Rainey as an expert and then asked his opinion. He did not do so.

2. He should have invoked Rule 106 in a timely fashion as required by its provisions. He did not do so.

3. He should have offered or proffered pertinent parts of the letter into evidence to protect the record. He did not do so.

4. He should have brought the provisions of Rule 801 to the attention of the trial judge. He did not do so.

Trial counsel has a fundamental responsibility to make timely, accurate and complete objections in order to give the trial judge an opportunity to make a fair and fully informed ruling. This is a basic canon of trial

conduct. Where counsel fails to do this and seeks relief on appeal, he must advance justification for his failure to do so or protections afforded by the rules are waived. No such justification has been shown.

As the Eleventh Circuit's interpretation of Rule 106 now stands, the opinion unintentionally creates a tactical vehicle for circumvention of the Federal Rules of Evidence by enterprising trial attorneys to admit evidence that is otherwise inadmissible. The scope of misuse of Rule 106 is limited only by the imagination of this nation's trial attorneys. The Eleventh Circuit's published interpretation of Rule 106 constitutes a clear departure from the accepted and usual course of judicial proceedings and must be reversed.

CONCLUSION

The decisions of the Eleventh Circuit Court of Appeals should be reversed and the cause remanded to the district court for reinstatement of the final judgments for defendants.

Respectfully submitted,

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